



10-1-2007

## Lawyer Deception to Uncover Wrongdoing

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### Original Citation

Lloyd B. Snyder, Lawyer Deception to Uncover Wrongdoing, 78 *Cleveland Bar Journal* 10 (October 2007)

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Citation: 78 Clev. B.J. 10 2006-2007

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# Lawyer Deception to Uncover Wrongdoing

Colorado Chief Deputy District Attorney Mark Pautler had a dilemma. William Neal had brutally murdered three victims. He had left three witnesses, given them his pager number, and told them to give it to the police. He then fled. The police were able to contact Neal, but they could not get a fix on his location. After much discussion, during which Neal made references to his continued ability to kill, he offered to surrender if he could first speak to his former lawyer or a lawyer at the public defender office. Pautler tried, but was unable to reach Neal's former lawyer.

Pautler did not contact the Public Defender office. He later explained that he feared they would advise Neal to stop talking to law enforcement and further that he did not trust anyone at the PD office. Instead, he impersonated a public defender using the name Mark Palmer. Pautler spoke to Neal but did not respond to Neal's request for information about his rights. Pautler did assure him the police would honor their promise to give him a separate cell and cigarettes upon arrest, and also assured him his lawyer would be present. To the last request Pautler replied, "Right, I'll be present." Neal then surrendered without incident.

Pautler never informed Neal or the public defender who subsequently represented him about the deception. When Neal asked his assigned attorney about Mr. Palmer, the lawyer informed him the office had no person by that name. Relations between Neal and the lawyer were strained after that, and the defendant subsequently fired his lawyer and represented himself. He was convicted and sentenced to death. Pautler and the lawyer in the PD office disputed whether Neal's mistrust and subsequent discharge of his lawyer were precipitated by Pautler's deception. The lawyer assigned to Neal did not learn about Pautler's actions until two weeks after he began representing Neal when he listened to the tapes of the surrender negotiations and recognized Pautler's voice.

Following these events the Colorado Attorney Regulation Counsel charged Pautler with violating Rules 8.4(c) and 4.3 of the Colorado Rules of Professional Conduct. This article discusses the Rule 8.4(c) charge. Colorado and Ohio have identical provisions in their Codes of Professional Conduct both reading as follows:

*It is professional misconduct for a lawyer to:*

*(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the act of another;*

\*\*\*

*(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . .*

The Colorado Supreme Court affirmed a hearing board decision that Pautler had violated the state's Rules of Professional Conduct by engaging in conduct involving deceit prohibited by Rule 8.4.<sup>1</sup> During the course of its decision the Court stated:

*In this proceeding we reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as a part of attempting to secure the surrender of a murder suspect. A prosecutor may not deceive an unrepresented person by impersonating a public defender.<sup>2</sup>*

The Pautler decision sent shockwaves through the legal community in Colorado and across the nation. The prohibition on lawyers engaging in conduct involving dishonesty, fraud, deceit or misrep-

<sup>1</sup> *Matter of Pautler*, 47 P.3d 1175 (Colo. 2002).

<sup>3</sup> Ohio Rules of Professional Conduct R. 8.4, Comment [2A].

<sup>2</sup> *Pautler* at 1176.

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resentation had been part of the legal ethics rules since 1969, but had never been held to cover activity designed to capture persons engaged in criminal activity. The wording of the rule is quite broad and absolute. It does not include any language that would admit of exceptions. Looking at the rule and the facts of the *Pautler* case, the result is perfectly reasonable.

The potentially broad application of the decision made lawyers nervous. It could be read to bar lawyers from supervising undercover law enforcement officers in sting operations and other investigations of illegal activity. It could be read to prohibit lawyers from sending testers purporting to seek employment, housing or public accommodations to obtain evidence of civil rights violations.

One could distinguish the *Pautler* case on the grounds that the lawyer personally deceived Neal. In most cases lawyers supervise investigators and other non-lawyers in conducting investigations that include deception. The rule does not provide much comfort for lawyers making this argument. By its terms, the rule bars lawyers from engaging in conduct involving deception; it is not limited to barring personal deception by the lawyer. Moreover, section (a) of the same rule bars a lawyer from violating the rules "through the acts of others."

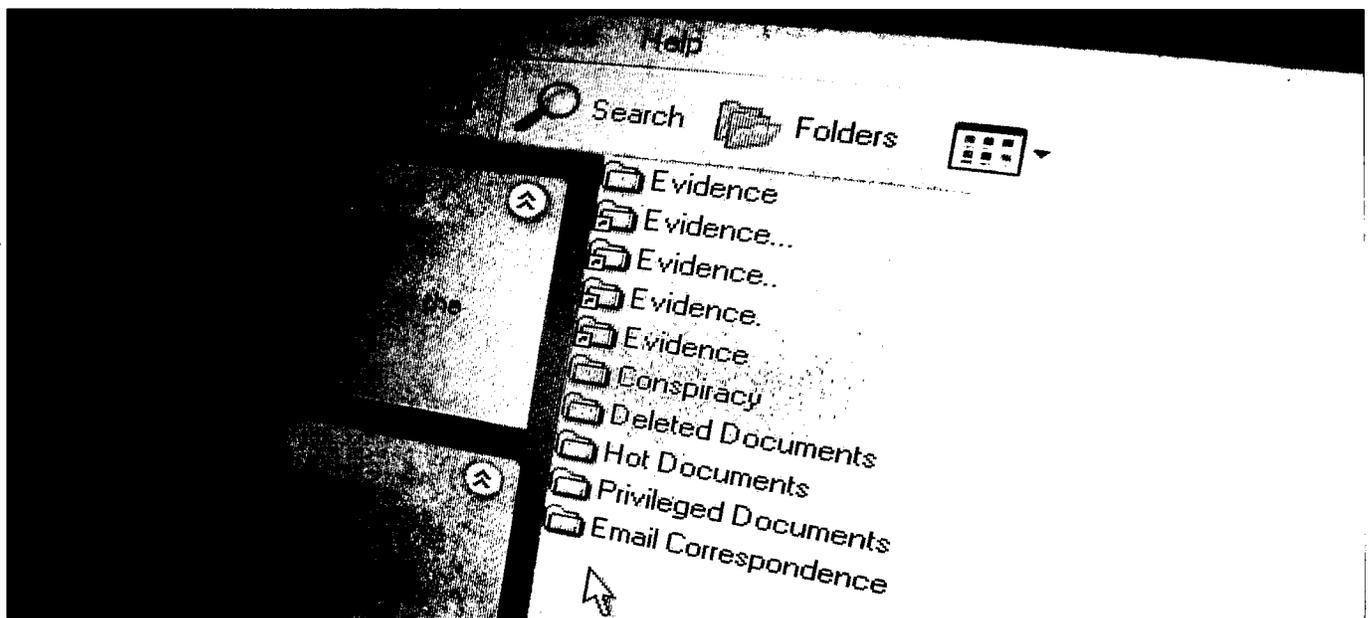
There are a number of other ways to distinguish Pautler's conduct from other cases of deception to investigate criminal activity or civil rights violations. Besides engaging in the deception personally, he purported to be representing the interests of the defendant while acting in a law enforcement capacity, he did not disclose his conduct following the arrest, and his motives were suspect based on his intent to prevent defense counsel from advising Neal not to talk to the police. The breadth of the language used by the Colorado Supreme Court and its failure to rely on the particular facts in the *Pautler* case may account for the decisions' notoriety.

The Ohio Rules of Professional Conduct include language identical to the Colorado rule. But the drafters also included language that should give comfort to prosecutors and civil rights lawyers using deception to uncover wrongdoing. They added a comment that is not found in Colorado or in the Model Rules. The Ohio comment notes that "[d]ivision (c) does not prohibit a lawyer from supervising or advising about lawful activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law."<sup>3</sup>

Three points are noteworthy about this comment. First, the rule directly applies to civil rights

lawyers who use testers to obtain evidence of discriminatory conduct and to prosecutors overseeing undercover agents. Second, the rule permits lawyers to oversee this conduct, but does not permit them to engage in the conduct personally. Pautler would not have been aided by the Ohio comment. Third, the rule does not permit a free for all in the name of investigating criminal or unconstitutional conduct. A lawyer may oversee the activity only when the covert activity is lawful or the investigation is authorized by law. But that should be the purpose of lawyer oversight of this kind of conduct in any event. The reason for having a lawyer give advice to undercover agents and testers is to make certain they do it correctly and lawfully. Otherwise, the information obtained may not be admissible. If lawyers overseeing sting and undercover operations and tester activity act in accordance with law to assure that the agents they advise do not behave improperly, they will be able to rely on the Ohio Rule comment to support their conduct. ☞

*Thanks to attorney Diane Citrino for bringing this comment to my attention.*



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